90-1211

Supreme Court, U.S.
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JAN 11 1991
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CLERK

NO. _____

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1990

LARRY LAUVER, PETITIONER

VS.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR

THE SIXTH CIRCUIT

"PETITION FOR WRIT OF CERTIORARI"

LARRY LAUVER, PRO SE
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QUESTION PRESENTED

In order to establish a violation of due process because of the Government's delay in obtaining an indictment, must a defendant show that the delay was an intentional device by the Government to gain a tactical advantage?

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1990

NO. _____

LARRY LAUVER, PETITIONER
VS
UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Larry Lauver petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The unreported opinion of the Court of Appeals is contained in Appendix A, infra.

JURISDICTION

This case originated by criminal indictment in the United States District Court for the Eastern District of Tennessee. Judgment in the Court of Appeals was entered on August 20, 1990. The order denying Lauver's petition for rehearing was entered November 14, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall***be deprived of life, liberty, or property, without due process of law....

STATEMENT

In September of 1983, the Southern Labor Union Health and Welfare Benefits Fund ("SLU") entered into a contract with Administrative Systems, Inc. ("ASI"), a Pennsylvania for-profit corporation, pursuant to which ASI was to process the health benefits claims of SLU members. The SLU was to pay a monthly sum to ASI and ASI was to pay any and all valid health claims presented for health benefits by the various miners who were members of the SLU. ASI set out to process those claims as provided by the Health Benefits Plan that had been adopted by the SLU.

At the time that ASI began administering the Fund, the SLU had a deficit of approximately One Million Dollars ($1,000,000.00). The Fund's

difficulties were complicated by the history of political in-fighting in the SLU organization, and were further complicated by economic problems within the coal industry during that time period.

Defendant Larry Lauver was the President of ASI and Defendant Gary Mason was the Vice President. In handling the health and medical claims of several thousand coal miner participants and hundreds of health care providers, ASI was required to keep extensive business records and Lauver had voluminous records and files regarding his activities as President of ASI, directly related to carrying out his daily duties as President.

At the time of the agreement between ASI and the SLU, a separate

agreement was entered into between ASI and Dome Insurance Company of the Virgin Islands ("Dome") pursuant to which Dome would provide re-insurance coverage for the SLU Health Benefits Plan claims. This re-insurance policy was placed in order to protect the SLU in the event that total health claims exceeded the amount of money that SLU had paid to ASI. Dome was controlled by Leo Bloom ("Bloom"), who operated Dome and numerous other business enterprises.

Dome failed and became insolvent in the spring of 1984. Shortly thereafter, on July 10, 1984, ASI was terminated as the administrative handler of health claims for the SLU.

After ASI was terminated in July of 1984, the SLU hired Professional Administrators, Ltd., of Lexington,

Kentucky, to take over administration of the health claims fund. Virtually all of the records of ASI pertaining to the SLU were taken over by Professional Administrators, Ltd., who assumed possession and control of those records. Those records included many of Lauver's own personal records regarding his daily activities and functions as President of ASI.

Federal Bureau of Investigation Agent Conley Carter ("Carter") testified that he began his investigation of ASI in this case after being contacted by a political rival of ASI in the fall of 1983, when ASI first began administering the SLU fund contract. In fact, Carter's investigation at that time was involved to such an extent that he had contacted Assistant United States Attorney Nancy

Palmer in the fall of 1983.

During the spring of 1984, at about the same time that Dome collapsed, the New York Strike Force and Federal Bureau of Investigation commenced an investigation of Bloom and Dome. Bloom was a convicted felon with at least one (1) prior conviction at that time. Lauver provided interviews to the FBI and testified regarding Bloom before a Federal Grand Jury in New York between May and July of 1984. Lauver not only cooperated with the Government through numerous conferences and interviews, but also furnished information and records that were helpful to the Government in pursuing Bloom. Knoxville FBI Agent Carter, the primary agent in the present case, was present during at least one of these conferences when

Lauver was assured that he was not a target in the investigation of Bloom, Dome and ASI. Lauver was not indicted as a result of the New York investigation of Dome, Bloom, and ASI. However, Carter continued his Knoxville FBI investigation of ASI and had decided by the summer of 1984 that charges were warranted and had identified certain statutes that he felt had been violated. He began gathering documents and evidence.

Lauver provided approximately six (6) interviews to FBI Agent Carter from May of 1985, through January 2, 1986. At no time during this period was he informed that he was a target of the investigation of ASI that resulted in the indictment. Grand Jury proceedings pertaining to the instant case were scheduled for

consideration as early as May 7, 1985. His last interview with Defendant Larry Lauver occurred on January 2, 1986. The Government brought the Indictment in this cause in February of 1989. In that Indictment, Leo Bloom, the former head of Dome Insurance Company, was named as an unindicted co-conspirator. The indictment charged Lauver with twelve (12) separate counts of conspiracy, fraud, and embezzlement allegedly arising out of Lauver's association with ASI. Mason was charged with twenty-nine (29) separate counts of similar charges.

From the last interview with Defendant Lauver on January 2, 1986, approximately three (3) years and one (1) month transpired before the bringing of the Indictment. The only

excuse offered by the Government for this lapse of time was that the United States Attorneys Office and the United States Attorney handling the case were under too heavy a work load during this period of time to allow the bringing of the Indictment. During the three year delay, there was virtually no investigative activity by the Government.

This was an admittedly complex case in which the Government estimated that it would call sixty (60) witnesses. Agent Carter testified that all of the witnesses that he had interviewed in preparation for trial had experienced memory loss relating to the events surrounding ASI's administration of the SLU.

Not only had Carter interviewed numerous witnesses prior to 1986, but

he had also worked closely with officials with the SLU and with their attorney, Irwin Cutler, in gaining assistance and documentation for the investigation. This relationship continued throughout the investigation with the Louisville, Kentucky, office of the FBI working closely with Attorney Cutler and the SLU in coordinating and gathering of documents and evidence through the new administrators, Professional Administrators, Ltd. While the Government thus had its investigative work done by mid-1986, Defendant Lauver was not notified that he was a target of the investigation until September, 1988.

The Defendants filed motions to dismiss based on, among other things, the Government's delay of nearly five

(5) years in obtaining the Indictment. The motions were supported by briefs and affidavits. A hearing on the motions was conducted before Honorable United States Magistrate Joe Tilson on August 18, 1989, at which Lauver and Mason testified regarding the loss of records during the near five (5) year delay. Other witnesses also testified relating to the loss of records. Magistrate Tilson entered a Report and Recommendation denying Defendants' motions to dismiss on August 23, 1989. Honorable United States District Judge Thomas Hull then entered an Order denying Defendants' motions on September 13, 1989.

Lauver pled guilty to Count 11 of the Indictment on September 26, 1989. Count 11 alleged an improper transfer of Fourteen Thousand Eight Hundred

Twenty Two Dollars and Eight Cents ($14,822.08) by Mason and Lauver to purchase a house. In the Plea Agreement, Lauver reserved the issues for appeal presented to the United States Court of Appeals for the Sixth Circuit.

Lauver was sentenced to eighteen (18) months and ordered to pay restitution in the amount of Sixty Six Thousand Five Hundred Thirty Eight Dollars and Thirty Three Cents ($66,538.33).

REASONS FOR GRANTING THE PETITION

I. Conflicts in Decisions of United States Courts of Appeals:

The decision of the United States Court of Appeals for the Sixth Circuit in this case is in conflict with Howell vs. Barker, 904 F. 2d 889 (4th Cir. 1990), a case in which this Court recently denied a petition for certiorari filed by the North Carolina Attorney General. Howell vs. Barker is Docket Number 90-336 in this Court.

The Sixth Circuit in this case, and in previous cases, held that there is a violation of due process only if the Government's delay is an intentional device to gain a tactical advantage. Appendix A, p. 3. See also United States vs. Duncan, 763 F. 2d 220, 222 (6th Cir. 1985), and

United States vs. Greene, 737 F. 2d 572, 574 (6th Cir. 1984). The Sixth Circuit in the present case rejected Lauver's position that something less than deliberate Government conduct is sufficient to establish a due process violation.

In Howell vs. Barker, supra, 904 F. 2d, at 894, the State of North Carolina argued that a defendant must show improper prosecutorial motive to gain due process relief for pre-indictment delay. However, the Fourth Circuit held that due process does not necessarily depend on a showing of deliberate and intentional Government conduct. Id, at 895.

II. The United States Court of Appeals for the Sixth Circuit decided a Federal question in a

way that conflicts with the Decisions of the United States Supreme Court:

The Sixth Circuit's position is in conflict with the holdings of this Court. In United States vs. Lovasco, 431 U.S. 783, 795, f.n. 17 (1977), this Court clearly set forth that a due process violation could be made out by showing prosecutorial delay that was incurred in reckless disregard of the circumstances, known to the prosecution, that would suggest that there existed an appreciable risk that such delay would impair the ability of a defendant to mount an effective defense.

The fact that either intentional conduct or reckless conduct qualifies for a violation of due process was reaffirmed in United States vs.

$8,850.00, 461 U.S. 555, 563 (1983), where this Court stated the following:

> As articulated in United States vs. Lovasco, 431 U.S. 483, 97 S. Ct. 2044, 52 L.Ed. 2d 752 (1977), such claims can prevail only upon a showing that the Government delayed seeking an indictment in a deliberate attempt to gain an unfair tactical advantage over the defendant or in reckless disregard of its probably prejudicial impact upon the defendant's ability to defend against the charges. (Emphasis added.)

Both the Sixth Circuit and the District Court failed to take into consideration whether the Government's conduct in waiting three (3) years from the time of the completion of its investigation to the bringing of the indictment constituted reckless disregard of Lauver's Fifth Amendment due process rights. The lower Courts held that the only way Lauver could establish a Fifth Amendment violation

would be to prove that the Covernment intentionally entered into the delay for the purpose of gaining a tactical advantage. Such a holding ignores Lovasco and places a burden of proof on Lauver that is, in most cases impossible, and also improper under the holdings of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Darry B. Lauver, Pro Se

FILED
SEP 13 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

UNITED STATES OF AMERICA

V. NO. CP-3-89-10

GARY PHILIP MASON and
LARRY B. LAUVER

O R D E R

Defendants Gary Philip Mason and Larry B. Lauver are charged in a twenty-nine-count indictment with conspiracy, wire fraud, theft, embezzlement, and conversion of union funds. They have moved to dismiss the indictment on the ground that extreme prosecutorial delay has violated their due process rights. [Doc. 21].

United States Magistrate Joe A. Tilson conducted a full hearing on this question and has recommended that the motion be denied. He found that Conley Carter, Special Agent for the Federal Bureau of Investigation, was first alerted to the possibility of criminal activity in November of 1983; that he initiated contact with Assistant United States Attorney Nancy Palmer in November of 1983; that he began an in-depth investigation into the case in the summer of 1984; that Nancy Palmer was officially assigned the case in October of 1984; that Agent Carter filed what he thought would be his final investigative report on June 2, 1986; that Nancy Palmer did not act on the case; that she resigned from the United States Attorney's office on January 15, 1988;

that Jimmy Baxter was then assigned to the case; that in September of 1988, the defendants received letters notifying them that they were targets of investigation; and that the indictment was not brought until February 7, 1989.

The long delay in initiating prosecution was caused by a backlog of criminal cases in the United States Attorney's office, partly the result of the major commitment of the office's resources to the investigations and prosecutions related to the collapse of the Butcher banking empire. Evidently, this relatively complex case was put on a back burner while relatively simple criminal cases were prosecuted in a timely fashion. While this may have been poor judgment on the part of the Government, the

Magistrate found no evidence that the Government deliberately delayed its prosecution in order to gain a tactical advantage.

The test of whether pre-indictment delay amounts to a due process violation was established in United States v. Lovasco, 431 U.S. 783, 789-790 (1977). That case held that, in order to have the indictment dismissed for prosecutorial delay, the defendant has the burden of showing that the delay was caused by the government solely to gain a tactical advantage over the accused and that the defendant suffered actual prejudice as a result.

The defendants, at the time giving rise to the charges in the indictment, had been employees of Administrative Systems, Inc., ad-

ministering the funds of the Southern Labor Union Health and Welfare Benefits Fund. In August of 1984, Professional Administrators, Ltd., took over the administration of the fund and certain records which presumably would have been beneficial to the defendant's defense in this lawsuit passed out of their control. To make matters worse, in October of 1985, Professional Administrators, Ltd., trashed about two truckloads of records of the Southern Labor Union Health and Welfare Benefits Fund. Additional records that defendant Mason kept in his home were destroyed by flooding in December of 1987. Because of this loss of records, as well as the general dimming of memory and lost contacts with possible witnesses, the defendants feel themselves highly

prejudiced by the delay in this cause.

It appears to the Court that the action that most prejudiced the defense was the trashing of Southern Labor Union records in October of 1985. This occurred well before Agent Carter issued his report in June of 1986. Even if the Government had moved to indict that same summer, the defendants would have suffered much of the same harm. Certainly they have shown no causal relationship between the loss of helpful evidence and the Government's prosecutorial delay.

The Court agrees with the Magistrate that the defendants have failed to establish a due process violation and that the indictment should not be dismissed.

Accordingly, the report and recommendation of United States Magis-

trate Joe A. Tilson is approved and adopted. The defendant's motion to dismiss the indictment is hereby DENIED.

E N T E R :

/s/ Thomas G. Hull
THOMAS G. HULL
UNITED STATES DISTRICT JUDGE

FILED
AUG 20 1990
LEONARD GREEN, Clerk

No. 89-6532

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOT RECOMMENDED FOR FULL TEXT PUBLICATION Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be prominently displayed if this decision is reproduced.

UNITED STATES OF AMERICA

, Plaintiff-Appellee

v. ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

GARY PHILIP MASON; LARRY B. LAUVER

Defendants-Appellants

_____/

BEFORE: MARTIN and WELLFORD, Circuit Judges; and SILER*, Chief District Judge.

PER CURIAM. On February 9, 1989, an indictment was returned against defendants, Gary P. Mason and Larry B. Lauver, alleging multiple counts of conspiracy, fraud, and embezzlement of money from the Southern Labor Union Health and Welfare Fund. Mason and Lauver moved to dismiss the indictment because of the Government's delay in obtaining the indictment against them. The district court denied their motions to dismiss, and Mason and Lauver each negotiated plea agreements, reserving the right to appeal the district court's refusal to

*The Honorable Eugene E. Siler, Jr., Chief District for the Eastern District of Kentucky, sitting by designation.

dismiss. In this appeal, we hold that the district court properly denied Mason and Lauver's motions to dismiss.

Mason and Lauver were vice-president and president respectively of Administrative Systems, Inc. In September 1983, the Union entered into a contract with Administrative Systems under which Administrative Systems would administer the Union's health benefits plan. The Union was to pay a monthly fee to Administrative Systems, and Administrative Systems was to pay all valid claims for health benefits presented by miners who were members of the Union. The Union terminated its relationship with Administrative Services on July 10, 1984, and hired Professional Administrators, Ltd. of Lexington, Kentucky, to administer the fund on August 1, 1984.

The Federal Bureau of Investigation received a tip regarding possible wrongdoing by Administrative Systems in handling the Union's health benefits plan in November 1983. FBI Agent Conley Carter began investigating the case during the summer of 1984. Agent Carter interviewed Mason and Lauver several times, but never told them that they were the subject of an investigation. Assistant United States Attorney Nancy Palmer was assigned the case in October 1984, but she did not have time to work on it because of a backlog at the U.S. Attorney's office in the Eastern District of Tennessee. Nonetheless, Agent Carter continued the investigation until June 2, 1986, when the investigation reached the point where it required input by a prosecuting

attorney. Palmer was still too busy to provide any assistance before she left the U.S. Attorney's office in January 1988. After Palmer's resignation, Assistant U.S. Attorney Jimmie Baxter took responsibility for the case. At Baxter's behest, Agent Carter conducted some additional investigation during 1988. On September 9, 1988, Mason and Lauver received letters from the Department of Justice informing them that they were the targets of an investigation. Mason and Lauver were indicted on February 8, 1989.

Mason and Lauver contend that the delay in issuing the indictment resulted in the violation of their due process rights under the fifth amendment and in the violation of the statute of limitations. The Supreme

Court considered what type of delay in issuing an indictment can amount to a violation of the fifth amendment in United States v. Lovasco, 4313, U.S. 783 (1977). The Court held that pre-indictment delay may violate the fifth amendment if the government does not have a legitimate reason for the delay and the defense is prejudiced. On the facts of Lovasco, the Court held that the defendant's rights were not violated because the government delayed bringing an indictment in order to further an investigation. Id. at 790.

In the Sixth Circuit, we have interpreted Lovasco to hold that delay in obtaining an indictment violates a defendant's right to due process only if the defense suffers "substantial prejudice to his right to a fair trial

and [] the delay [is] an intentional device by the government to gain a tactical advantage." United States v. Duncan, 763 F.2d 220, 222 (6th Cir. 1985) (quoting United States v. Greene, 737 F.2d 572, 574 (6th Cir. 1984)). Mason and Lauver contend that we should interpret Lovasco to hold that due process rights are also violated by reckless disregard of a known, appreciable risk that delay would prejudice the defense, relying on dicta in Lovasco, 431 U.S. at 795 n. 17, and United States v. $8,850, 461 U.S. 555, 563 (1983). However, the Court has stated more recently that "deliberate" delay is required for a fifth amendment violation. United States v. Gouveia, 467 U.S. 180, 192 (1984). In addition to Gouveia, we are bound by our previous

decision rejected the "view that proof of intentional government delay [to gain an advantage] is not necessary." United States v. Lawson, 780 F.2d 533, 541 (6th Cir. 1985).

Mason and Lauver do not show either the intentional delay or the prejudice required to prove a fifth amendment violation for delay in bringing an indictment. First, Mason and Lauver make no showing that the government's delay in indicting them was an intentional device designed to gain a tactical advantage. Duncan, 763 F.2d at 222. The parties agree that the delay resulted from a backlog in the U.S. Attorney's office at the time of the investigation. We do not wish to condone this reason for delay, but we are confident that the failure to give the case higher priority was

not a deliberate tactic in violation of the fifth amendment.

Second, Mason and Lauver fail to show that the delay substantially prejudiced the defense. Id. A defendant bears the burden to show how the delay actually prejudiced the defense. Id.; United States v. Comosona, 848 F.2d 1110, 1113-14 (10th Cir. 1988). Mason and Lauver contend that their defense was prejudiced by witnesses' loss of memory and by the destruction of documents by parties other than the government. However, Mason and Lauver fail to explain how the lost documents or the witnesses' testimony would have exculpated them. Id. Because Mason and Lauver fail to show either actual prejudice or deliberate delay to gain a tactical advantage, they fail to show a

violation of their due process rights under the fifth amendment.

Mason and Lauver's other contention on appeal is that the statute of limitations bars the charges against them in Count 11 of the indictment for embezzling funds from the Union's health benefits plan in violation of 18 U.S.C. §664. This statute makes it a federal crime to embezzle money from a fund covered by the Employment Retirement Income Security Act of 1974, 29 U.S.C. §1001, et seq. 18 U.S.C. §664. The embezzlement to which Mason and Lauver pled guilty occurred in May and June of 1984, and their indictment was filed slightly less than five years later -- on February 8, 1989. Mason and Lauver contend that the relevant statute of limitations is three years under 29

U.S.C. §1113: However, second 1113 explicitly governs only actions "commenced under this subchapter...." 29 U.S.C. §1113. the statutory basis for the guilty pleas in this case is not found in "this subchapter," but in a completely different title of the United States Code. 18 U.S.C. §664. Thus, prosecution under 18 U.S.C. §664 is not governed by the three year limitation in 29 U.S.C. §1113, but rather by the general limitation of five years in 18 U.S.C. §3282. The government's prosecution of Mason and Lauver commenced before this five years had passed, and it is not barred by the statute of limitations. 18 U.S.C. §3282.

The judgment of the district court is affirmed.

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No. 89-6532

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

O R D E R

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

GARY PHILIP MASON; LARRY B. LAUVER

Defendants-Appellants

BEFORE: MARTIN and WELLFORD, Circuit Judges; and SILER, Chief District Judge.*

Upon consideration of the petition for rehearing filed by the appellant, the court concludes that the issues raised therein were fully considered upon the original oral argument and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is DENIED.

ENTERED BY ORDER OF THE COURT
/S/ Leonard Green
Leonard Green, Clerk

*----------
The Honorable Eugene E. Siler, Jr., Chief District for the Eastern District of Kentucky, sitting by designation.

Supreme Court, U.S.
FILED
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No. 90-1211

In the Supreme Court of the United States

OCTOBER TERM, 1990

LARRY B. LAUVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the government's delay in obtaining an indictment against petitioner deprived him of due process.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1211

LARRY B. LAUVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 8-18) is unreported, but the judgment is noted at 911 F.2d 734 (Table), *sub nom. United States* v. *Mason*. The opinion of the district court (Pet. App. 1-7) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1990. A petition for rehearing was denied on November 14, 1990. Pet. App. 19-20. The petition for a writ of certiorari was filed on January 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the Eastern District of Tennessee to embezzling funds of an employee benefit plan, in violation of 18 U.S.C. 664. He was sentenced to 18 months' imprisonment. The court of appeals affirmed. Pet. App. 8-18.

1. Petitioner was the president of Administrative Systems, Inc. (ASI). In September 1983, ASI entered into a contract with the Southern Labor Union Health and Welfare Fund (the Union), under which ASI would administer the Union's health benefits plan. The Union ended its relationship with ASI in 1984. Pet. App. 10.

During the summer of 1984, Special Agent Conley Carter of the Federal Bureau of Investigation began investigating allegations of wrongdoing by ASI in administering the Union's health benefits plan. In October 1984, Assistant United States Attorney Nancy Palmer was assigned to handle the case. Agent Carter continued the investigation until June 1986, at which time he sought input from a prosecuting attorney. Palmer did not respond. After Palmer left the United States Attorney's office in January 1988, the case was reassigned to Assistant United States Attorney Jimmy Baxter. At Baxter's direction, Agent Carter conducted additional investigation during 1988. Petitioner was indicted on February 8, 1989. Pet. App. 11-12.

2. Before trial, petitioner moved to dismiss the indictment, claiming that the government's delay in initiating the prosecution deprived him of due process. The district court denied the motion. Citing this Court's decision in *United States* v. *Lovasco*, 431 U.S. 783 (1977), the court ruled that a defendant seeking dismissal of an indictment because of prosecutorial delay "has the burden of showing that the delay was caused by the government solely to gain a tactical advantage * * * *and* that the defendant suffered

actual prejudice as a result." Pet. App. 4 (emphasis in original).

The district court concluded that petitioner failed to satisfy either prong of this test. First, the court found that the government's delay in seeking an indictment against petitioner resulted from a "backlog of criminal cases in the United States Attorney's office" and that there was "no evidence" that the government deliberately had delayed processing the case to gain a tactical advantage. Pet. App. 3-4. Turning to the question of prejudice, the court noted that petitioner's most significant claim of prejudice was that records relating to ASI's administration of the Union's health benefits plan had been thrown away after the Union terminated its contract with ASI.[1] *Id.* at 5-6. The court found, however, that those records were discarded in October 1985, well before Agent Carter completed his investigation, so that even if the government had acted promptly in seeking the indictment, petitioner "would have suffered much of the same harm." *Id.* at 6. The court concluded that petitioner had "shown no causal relationship between the loss of helpful evidence and the Government's prosecutorial delay." *Ibid.* Petitioner then entered a conditional plea of guilty, reserving the right to appeal the denial of the motion to dismiss the indictment. *Id.* at 9-10.

3. The court of appeals affirmed. On appeal, petitioner argued that the government's "reckless disregard" of the risk that prosecutorial delay would prejudice his defense had deprived him of due process. Pet. App. 14. The court of appeals rejected that claim, holding that to establish a deprivation of due process, a defendant must show both

---

[1] Petitioner also raised a broader claim that the delay prejudiced him because of "the general dimming of memory and lost contacts with possible witnesses," Pet. App. 5, but the district court rejected that claim without explicit discussion.

that he suffered "substantial prejudice" as a result of the preindictment delay and that the delay was an "intentional device by the government to gain a tactical advantage." *Id.* at 13-15 (quoting *United States* v. *Duncan*, 763 F.2d 220, 222 (6th Cir. 1985)).

The court of appeals agreed with the district court that petitioner had shown neither the intentional governmental misconduct nor the prejudice required to establish a deprivation of due process. Pet. App. 15. The court noted that "[t]he parties agree[d]" that the delay was caused by a backlog of cases in the United States Attorney's office and stated that "we are confident that the failure to give the case higher priority was not a deliberate tactic" by the government. *Id.* at 15-16. The court also rejected petitioner's claim that his defense had been prejudiced by witnesses' loss of memory and the destruction of documents, observing that petitioner had failed to explain how the lost documents or the witnesses' testimony could have aided his defense. *Id.* at 16. Accordingly, the court found no deprivation of due process. *Id.* at 16-17.

ARGUMENT

Petitioner renews his contention that the government's delay in obtaining the indictment against him deprived him of due process. Pet. 14-18. The court of appeals correctly rejected that claim.

It is well settled that a claim that preindictment delay has deprived a defendant of due process cannot prevail without a showing of "actual prejudice" resulting from the delay. *United States* v. *Lovasco*, 431 U.S. at 789-790; *United States* v. *Marion*, 404 U.S. 307, 324-325 (1971). Moreover, this Court has made it clear that prejudice alone is not enough to require dismissal of an indictment. See *Lovasco*, 431 U.S. at 790 ("proof of prejudice is generally a necessary but not

sufficient element of a due process claim"); *Marion*, 404 U.S. at 324-325 ("no one suggests that every delay-caused detriment to a defendant's case should abort a criminal prosecution"). Thus, although the Court has made clear that some additional showing of governmental misconduct is necessary, it has not yet decided whether the misconduct need be intentional. Compare *United States* v. *Gouveia*, 467 U.S. 180, 192 (1984) (dictum) (dismissal of indictment required if defendant can prove that government's delay in bringing indictment was "a deliberate device to gain an advantage over him"), with *United States* v. *$8,850*, 461 U.S. 555, 563 (1983) (dictum) (due process challenge to preindictment delay can prevail upon a showing of government's "reckless disregard of [delay's] probable prejudicial impact"), and *Lovasco*, 431 U.S. at 795 n.17 (noting government's concession that due process violation might be established on basis of showing of government's reckless disregard of risk of prejudice to defense, but finding "no evidence of recklessness here").

There is no need for the Court to resolve that question in this case. Both courts below found that petitioner had not established that the government's delay in seeking his indictment prejudiced petitioner in any way, and petitioner does not challenge those findings here. Because petitioner failed to make the threshold showing of prejudice necessary to establish that the preindictment delay deprived him of due process, the courts below correctly rejected his claim.

Petitioner's contention (Pet. 14-15) that the decision in this case conflicts with the decision of the Fourth Circuit in *Howell* v. *Barker*, 904 F.2d 889, cert. denied, 111 S. Ct. 590 (1990), is incorrect. In *Howell*, the court found a defendant had been deprived of due process where the State conceded that the defendant had been prejudiced by preindictment delay and that the only justification for the delay

was "mere convenience." 904 F.2d at 895. The court specifically noted, however, that consideration of the government's justification for prosecutorial delay is warranted only after the defendant has shown that he was prejudiced by the delay. *Ibid.* Because petitioner was unable to show that the government's delay in seeking his indictment resulted in actual prejudice, *Howell* would not require a different result in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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